IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.389 OF 2005

Zandu Pharmaceuticals Works Ltd. ... Appellant

Vs.

Municipal Corporation of
Greater Mumbai. ... Respondents

Mr. J.J. Shah for the appellants.

Mr. J. Xavier for the B.M.C.

CORAM: SMT. RANJANA DESAI, J.

DATED: 3RD MARCH, 2005.

P.C.:-

1. This first appeal is directed against the judgment and decree dated 18/1/2005 passed by the City Civil Court at Bombay, in L.C. Suit No.2310 of 1999. In my opinion, this first appeal deserves to be summarily rejected. However, being a first appeal, I thought that I should peruse all the relevant documents and hear the learned counsel appearing for both sides before passing any order. Accordingly, I have heard, at length, Mr. Shah, the learned counsel for the appellant and Mr. Xavier, the learned counsel for the B.M.C. I have perused the pleadings, the depositions and the relevant documents, copies of which were made available to me by the learned counsel.

2. The plaintiff is a company engaged in pharmaceutical works. The plaintiff is having its pharmaceutical plant

at Gokhale Road (South), Dadar, Mumbai - 400 025. According to the plaintiff, on or about 11/2/1978, excavation work near the wall of the said plant on Sayani Road was undertaken by the defendants. The plaintiff came to know that the work of construction of urinal block was in progress. The plaintiff, therefore, filed a suit beaing L.C. Suit No.4808 of 1996 against the defendants in the City Civil Court at Bombay for an injunction restraining the defendants from carrying out further construction work. The plaintiff withdrew the said suit on 11/3/1999 with liberty to institute a fresh suit after issuing a notice under section 527 of the B.M.C. Act. The court granted interim protection to the plaintiff in respect of the beautification which it had carried out on the footpath near its plant. The plaintiff then issued notice under section 527 of the B.M.C. Act on 6/8/1996 and, thereafter, filed the instant suit. The plaintiff's claim about the notice is, however, disputed by the learned counsel for the defendants.

3. According to the plaintiff, on a request made by the plaintiff, by letter dated 20/11/1985, the plaintiff was allowed to barricade the footpath portion 3 mtrs., from the compound wall on Gokhale Road (S) with ornamental fencing and develop the footpath portion as a small garden subject to the plaintiff agreeing to the terms and conditions as mentioned in the memo of conditions accompanying the said letter. It is the plaintiff's case that accordingly, the plaintiff erected a barricade and

developed a small garden. Thereafter, by letter dated 5/6/1996, the defendants revoked the permission and asked the plaintiff to remove the fencing. However, the plaintiff did not remove the fencing. Again by a letter dated 5/8/1996, the defendants called upon the plaintiff to remove the fencing. It was made clear in the said letter that the permission granted to the plaintiff for beautification of footpath was revoked and necessary steps are being taken by the defendants to dismantle the fencing and clear the footpath at their risk and costs. The plaintiff, therefore, filed the instant suit praying inter alia, for a declaration that notices dated 5/6/1996 and 5/8/1996 are bad in law and for an injunction restraining the defendants from removing the fencing and the garden.

4. The plaintiff filed affidavit of examination-in-chief of its Manager - Mr. Pandurang N. Tamore. He was cross-examined by the defendants. The defendants, however, did not file any written statement nor did the defendants examine any witnesses.

5. The trial court by the impugned order dismissed the suit holding that the letter dated 20/11/1985 granting permission to the plaintiff did not create any right in favour of the plaintiff. This judgment and decree is impugned in this petition.

6. The learned counsel for the appellant submitted that as far back as on 20/11/1985, the permission for

beautification of the footpath had been granted to the plaintiff. The plaintiff has put up fencing and beautified the footpath. The plaintiff has not created any nuisance and, therefore, the permission ought not to have been revoked. In my opinion, the trial court is right in dismissing the suit. No right of whatsoever nature is created in favour of the plaintiff by the defendants. The plaintiff was merely given a permission to beautify the footpath. Once the permission is revoked, the fencing must be dismantled.

7. There is no merit in the submissions of Mr. Shah that because no written statement is filed by the defendants, the plaintiff must succeed. The plaintiff's manager was cross-examined by the defendants. He has admitted that the land does not belong to the plaintiff. The plaintiff has not produced the memorandum of terms and conditions which was annexed to the permission granted by the defendants. The plaintiff has not discharged the burden which rested on it to prove that it had any legal right in a public footpath. Therefore, the burden never shifted to the defendants. The fact that the defendants did not file any written statement does not help the plaintiff. The plaintiff has utterly failed to prove any right in the public footpath. If the defendants want to use the footpath for any public purpose by constructing a urinal, the defendants cannot be restrained from doing so. In my opinion, there is no merit in the appeal and, hence, it is dismissed.

8. At this stage, the learned counsel for the plaintiff requests that the impugned decree may be stayed for sometime. Mr. Xavier opposes this. In the circumstances of the case, execution of the impugned decree is stayed for a period of four weeks from today.

9. The first appeal is disposed of in the aforestated terms along with the connected civil application.

(SMT. RANJANA DESAI, J.)